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ABSTRACT

The political trials of the past two decades have shown the misuse and abuse of judicial summary contempt power in limiting individual liberty. The primary justification offered for use of the contempt power has been the need to deter obstruction of the administration of justice. The trials of the Chicago 7 and the Black Panthers were intricately linked with American political currents, and this type of trial has spotlighted the conflict between freedom of speech and the need for order in the courtroom. Responses such as the binding and gagging of defendants that occurred in these trials not only punish any obstruction of the judicial process, but also serve as a prior restraint on the defendant's freedom to communicate. Such action is both harmful and unnecessary. Actions that impede or preclude oral communication in a conflict situation such as a trial only beg for more violent responses. It has been contended that wise use of the power can reduce its deleterious effects, but such wisdom is nearly impossible to achieve. Judges will embody the values of the politicians who appointed them and can hardly function effectively while they are objects of vilification. That a judge could dispassionately use the contempt power following bitter confrontation is unlikely. Finally, the use of the summary contempt power places the judge in a dual and untenable position of both bringing and trying charges against a defendant, antithetical to American judicial law. Disruptive conduct can and should be disciplined without restraining a defendant's future right to speak. (HTH)

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THE COST OF FREEDOM: SPEECH IN THE COURTROOM

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The Cost of Freedom: Speech in the Courtroom

Justice Hugo Black, author of the majority opinion in Bridges v. California, declared, "For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[1] For those who believe that complete freedom of speech may jeopardize the fairness of American justice, the summary contempt power has provided a means of righting the balance. However, the political trials of the past decade have evidenced the misuse and abuse of that power in limiting individual liberty. This paper will examine the rationale for use of the contempt power and will argue for its abolition.

The power of the courts to punish contempt is almost exclusively a tradition of the English and American legal systems. While the first implementation of the power went unrecorded, Shakespeare wrote of Prince Hal's confrontation with the law of contempt in Henry IV.[2] Early use of the power included the 1631 case of a defendant who threw a brick at a judge. The man's hand was cut off and he was immediately hanged in front of the court.[3]

American legal history is also replete with less severe examples of use of the contempt power. Several

cases in the previous century clarified the American position. The United States Supreme Court in Ex parte Robinson ruled:

> The power to punish for contempts is inherent in all courts. The moment that the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[4]

The primary justification offered for use of the contempt power has been the need to deter obstruction of the administration of justice. In Ex parte Terry the United States Supreme Court found:

> Without it (the contempt power), judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them.[5]

To secure this decorum in the courtroom, judges have been given the power to gag and bind or physically remove a defendant found in contempt.[6] Though they have repeatedly defended the power, the Supreme Court has only once charged an individual with contempt. Obviously respect may also depend on the quality of justice dispensed by a court.

While the rationale for the contempt power was clearly enunciated during the previous century, its primary challenge has occurred during the past two decades. The political trials of the 1960's and early 1970's exemplified the potential for abuse in the restriction of defendants' freedom of speech. The case of the Chicago 7 serves as a prime example.

The characteristics that distinguish a political trial from other civil or criminal litigation are generally lacking in definition. Some, like Louis Nizer, contend that political trials do not exist.[7] William Kunstler, by contrast, described a political trials as any one "in which the defendant feels he is not getting a fair shake."[8]

Regardless of the definition of such a trial, the New York Bar Association's Committee on Courtroom Conduct identified three means by which trials become politicized. The Bar found that political factors may affect either the decision to prosecute or the outcome of the case. In addition, the litigants may use the trials to further political ends.[9] Justice William Douglas cited five cases in America's legal history that illustrate these conditions: Spies (1887), Debs (1887), Mooney (1935), Sacco and Vanzetti (1926), and Dennis (1951).[10]

In more recent times the trials of the Chicago 7 and of 13 Black Panthers in New York are classic examples. The selection of the defendants in the Chicago conspiracy trial, considering that they had all met together on only one occasion, was indicative of ulterior motives. Robert Sedler, University of Kentucky law professor, saw the indictments as an attempt to blunt the anti-war movement.[11] Even the Supreme Court had previously admitted that the prospects of prosecution may have a "chilling effect upon the exercise of First Amendment rights."[12] The defendants

were also active in using the trial to gain publicity for their cause.

In New York a group of Black Panthers were tried on charges of planning to bomb several buildings. Local prosecutors acknowledged that their intent was to "shock people who had sympathized with the Panthers."[13] On the other hand, the Panthers intended to use the trial to "educate the people" about the oppression that Blacks suffer.[14] In both Chicago and New York the trials were intracately linked with political currents on the American scene.

It is this type of trial that has spotlighted the conflict between freedom of speech and the need for order in the courtroom. In the Chicago courtroom, Judge Julius Hoffman was referred to as "a blatant racist," "a facist dog," "a pig," "mother fucker" and a "rotten, low-life son-of-a-bitch." Also labeled as contumacious behavior was Abbie Hoffman's kiss blown to the jury and Tom Hayden's clinched-fist salute.[15] In a similar trial in Pennsylvania, a judge was called a "dirty son-of-a-bitch," "dirty tyrannical old dog," "stumbling dog" and "fool."[16]

To prevent such outbursts, judges have moved to silence defendants. Judge Hoffman had Bobby Seale handcuffed, tied to a chair, gagged and his face wrapped in bandages. Others have been physically removed from courtrooms.[17] A response of this nature not only punishes

any obstruction of the judicial process, but it also serves as a prior restraint on the defendant's freedom to communicate. It is the contention of this paper that such action is both harmful and unnecessary.

To expect the absence of verbal confrontation in civil and criminal litigation is to ignore the fact that either interpersonal or institutional conflict was the likely cause of the issue reaching a court. It is in the courtroom that the conflict must be decided, and the conflict means communication. As Fred Jandt has suggested, "There can be no conflict without verbal and nonverbal communication."[18] Justice Potter Stewart maintained that discontent, even animosity, was a necessary and desirable outcome of free speech. Said Stewart:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[19]

Actions that impede verbal communication, or preclude it completely, in a conflict situation only beg for a more violent response. It is the cessation of communication that marks the beginning of warfare, the most destructive stage, in John Keltner's systems of conflict.[20] Brief verbal outbursts may serve as a safety-valve, preventing a more serious confrontation. It is then evident that conflict

in the courtroom is not something to be universally feared and cannot be limited without restricting freedom of speech. Exercise of the summary contempt power engenders a substantial cost to individual liberty.

It has been contended, however, that wise use of the power can reduce its deleterious effects. The requirement for such wisdom would tax even Soloman. First, the judge is frequently a political creature. Almost all judges that are appointed serve due to their selection by a politician. Their identification with the political party and government institution responsible for their appointment is natural. In Chicago the judge that convened the grand jury to investigate the demonstrations was a close friend of Mayor Daley. Judge Hoffman was described by a Chicago lawyer as "regarding himself as the embodiment of everything Federal."[21] Expecting impartiality in these circumstances may be unreasonable.

It should also be anticipated that a judge will not be able to function effectively when he is also the object of vilification. Justice Douglas noted, "No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."[22] In an Illinois case the Supreme Court concluded that insults may strike "at the most vulnerable and human qualities of a judge's temperament."[23] That a judge could dispassionately use the contempt power following bitter confrontation is unlikely. The result of

this situation was summarized by Ronald Goldfarb in his seminal study of the contempt power:

> There is a danger that these convictions realistically may be more a result of governmental power being exercised for personal or emotional reasons than a desire to foster the efficient administration of justice.[24]

Finally, use of the summary contempt power places the judge in the dual and untenable position of both bringing and trying charges against a defendant. Once a judge has charged a defendant with contempt, what evidence can be marshalled to alter the judge's publically proclaimed evaluation? The dilemna was expressed by Justice Black:

> When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.[25]

Only for contempt charges is such an arrangement to be found in American law.

Undeniably, implementation of the contempt power results in a reduction in individual liberty and even a challenge to the fairness of courtroom justice. The freedom to speak suffers when a litigant is gagged or physically removed from the courtroom. Likewise, the rights to personally confront one's accusers, to serve as one's own counsel and to testify are abridged. Balanced against this is the calm and quiet courtroom that has

attained through silencing the defendant. While this environment may be pleasant to the judge, it has not been shown as a requirement of a fair trial. The New York Bar's report concluded that courtroom disruption was not a significant obstacle to justice in America.[26] This does not mean that deliberate disorder must go unpunished, since every jurisdiction has legislation concerning the obstruction of justice. Disruptive conduct can be disciplined without restraining a defendant's future right to speak. The choice between freedom of speech and a fair trial that Justice Black referred to is certainly a difficult task, and one that this paper has contended is unnecessary.

Notes

[1]314 U.S. 252 (1941).

[2]Shakespeare, Henry IV, part 2, act 5, scene 2.

[3]Ronald L. Goldfarb, The Contempt Power (New York: Columbia University Press, 1963), p. 15.

[4]86 U. S. 505 (1873).

[5]128 U.S. 289 (1888).

[6]Illinois v. Allen, 397 U.S. 337 (1970).

[7]Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, Disorder in the Court (New York: Association of the Bar of the City of New York, 1973), p. 77.

[8]Ibid., p. 78.

[9]Ibid,. pp. 80-88.

[10]Illinois v. Allen, 355.

[11]Robert A. Sedler, "The Summary Contempt Power and the Constitution: The View from Without and Within," New York University Law Review, 51 (1976), 55.

[12]Dombrowski v. Pfister, 380 U.S. 487 (1965).

[13]Frank F. Latham, American Justice on Trial (New York: Franklin Watts, 1972), p. 40.

[14]Ibid.

[15]David J. Danelski, "The Chicago Corspiracy Trial," in Political Trials, ed. Theodore L. Becker (Indianapolis: Bobbs-Merrill, 1971), p. 173.

[16]Mayberry v. Pennsylvania, 400 U.S. 467 (1971).

[17]397 U.S. 337 (1970).

[18]Fred E. Jandt, ed. Conflict Resolution through Communication (New York: Harper and Row, 1973), p. 2.

[19]Latham, p. 28.

[20]John W. Keltner, Interpersonal Speech Communication (Belmont, California: Wadsworth, 1970), pp. 230-231.

[21]New York Times, October 9, 1969, p. 30.

[22]400 U.S. 467 (1971).

[23]Bloom v. Illinois, 39] U.S. 202 (1968).

[24]Goldfarb, pp. 192-3.

[25]In re Murchison, 349 U.S. 136 (1955).

[26]Special Committee, p. 6.